United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

107

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,336

UNITED STATES OF AMERICA

v.

ROBERT L. ARMSTEAD

Appeal from a judgment of the United States
District Court for the District of Columbia

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September 17, 1970

QUESTIONS PRESENTED

1. Did the arresting officers have probable cause to arrest, based solely on information in a radio-run broadcast, giving a general description of an auto and its occupants?

2. Will a motion to suppress evidence of a search lie when the search of an automobile trunk is conducted at the scene of the arrest, without a search warrant, after all of the suspects have been disarmed and all officers who responded to a radio request for additional assistance of the original arresting officers have arrived on the scene?

(This case has not previously been before this Court.)

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TABLE OF AUTHORITIES

A. CASES

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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ROBERT L. ARMSTEAD,
Appellant

v.

UNITED STATES OF AMERICA,
Appellee

Appeal from a judgment of the United States District Court for the District of Columbia

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant appeals from a conviction in the United States District Court for the District of Columbia of the crimes of second degree burglary; grand larceny, two counts; robbery, two counts (22 D.C. Code, Sections 1801 (b), 2801 and 2901, Respectively)

REFERENCES TO RULINGS

None.

STATEMENT OF FACTS *

On June 13, 1969, at approximately 11:00 A.M., Reverend Isadore Richards happened to stop by his son's, Lamar Richards', residence at 804 Elder Street, N. W., Washington, D. C., while it was being burglarized by three men. (Tr. 4-6). As the Government's leadoff witness, Mr. Richards stated that as a result of this chance encounter, he was robbed by one of the three men (Tr. 6), who afterward forced him into a "back room". However, Reverend Richards was only able to give the police a general description of the suspects, giving the general color scheme of the clothing worn by two of the suspects (Tr. 7, 8) and a vague estimate of their height (Tr. 8), which, on cross, ranged from four feet, four inches to five feet, nine inches (Tr. 9). Further the Reverend testified that he was not able to pick out the suspects in a lineup held with co-defendants Armstead and Proctor in attendance. (Tr. 30).

A neighbor of Lamar Richards', Pauline Croci, lived in a house which had a back yard adjoining that of Lamar Richards. On June 13, 1969, she had observed the three men and they had aroused her suspicion. (Tr. 48) She also detected a 'blue Impala car',

* Throughout this brief, "Tr" refers to a page number in the transcript of trial; "Mot" refers to a page number in the transcript of the Motion to Suppress Evidence).

bearing Virginia license plates, (Tr. 49). She memorized the license plates at the time, and gave the number to the police, along with a description of the heights and clothing of the suspects. (Tr. 52).

The arrest was made by two plainclothes policemen, Officers Charles Kerick and Charles Haynes, working out of Criminal Investigation Division, Eastern Section, and the arrest was evidently based on a radio-run broadcast utilizing, to some extent, the information supplied by Reverend Richards and Pauline Croci, although the "Impala" term never appears in the broadcast, nor does the make of the car so appear. (Mot. 7) (Tr. 58). After hearing a radio-run message, at approximately 2:35 P.M., the arresting officers stopped a 1969 metallic blue Chevrolet, bearing Virginia tags 85274 (Tr. 59). Neither arresting officer offered any testimony that the car was operated in any unlawful manner while it was under his observation, but that it was merely stopped at a red traffic light. (Tr. 99, 59). The officers recovered: First, a German Luger pistol from the front floorboard of the car (Tr. 64); Second, a revolver from the rear seat of the car (Tr. 63); and Third, a .22 caliber rifle and ammunition from the trunk of the automobile. (Tr. 63).

The arrest and subsequent search were made the subject of a motion to suppress evidence, at a hearing held before the Honorable John Pratt, District Judge, on November 7, 1969. The

transcript of the entire radio run was made Government's Exhibit Number One at the motion to suppress. (Mot. 4, 41). The radio run did not give the make of the car, but did give the color, the fact that it bore Virginia tags and that the first three digits of the tag were 851 (Mot. 9). In addition, the radio run gave the following description of the suspects: "three Negro males, one with a white sailor cap, turned down; one of the persons was wearing gray trousers, a blue and white striped sweater, and the third was medium build wearing a tan shirt." (Mot. 7, 8). However, the white sailor hat was never recovered from the suspects, even though the hat was evidently being worn by one of the suspects at the time that Officer Haines took custody of the man wearing the hat. (Mot. 16-18). Officer Haines stated that this was all the information available to him and his partner concerning the suspects at the time that they sighted the car occupied by the defendants (Mot. 9).

Acting on the information in the radio-run and their observations of the suspected car, the officers stopped the forward progress of the car by blocking the car's path, (Mot. 30), with their police cruiser, and alighting from the cruiser with drawn guns, (Mot. 31). After hearing all testimony of Officer Haines, the court denied the motion to suppress, holding that the officers had probable cause to arrest and that, being a valid arrest, the search of the

automobile's trunk was proper. (Mot. 59).

At trial, witnesses Isadore Richards, Pauline Croci and Officer Haines testified as related above. Lamar Richards testified that his property was the subject of a burglary. (Tr. 41-43). Similarly, Bruno Cozzi testified that his rifle, case and bullets were burglarized from 804 Elder Street, N. W., on June 13, 1969, (Tr. 43), his residence at that time. Officer Kerick, being the driver of the police vehicle in which Officer Haines was a passenger, bolstered Officer Haines' testimony, in all important particulars. (Tr. 57-93). However, Government counsel utilized Officer Kerick to identify Government's Exhibit Number 2 and state where he saw the items which were Lamar Richards' property. (Tr. 61, 62). At that time, both defense counsel renewed their motion to suppress the items making up Government's Exhibit Number 2, (Tr. 62), and the Court noted the objection for the record.

After a Luck hearing, both defendants testified, Defendant Proctor going first. Defendant Armstead stated that he was headed toward an employment agency in the general vicinity of the arrest scene, (Tr. 163), and the reason that he was driving the car was that co-defendant Luck felt that he was too drunk to drive (Tr. 169). Defendant Armstead denied any knowledge of the articles found in the trunk of the car by the arresting officers, or that he had ever seen the articles so found. (Tr. 166).

Appropriate instructions were given the jury, to which the counsel for the defendant Armstead had no objection.

STATUTORY PROVISIONS INVOLVED

22 D. C. Code 1801 - Burglary--Penalties

"(b) Except as provided in subsection (a) of this section, whoever shall, either in the night or in the daytime, break and enter, or enter without breaking any dwelling, bank, store, warehouse, shop, stable, or other building or any apartment or room, whether at the time occupied or not, or any steamboat, canalboat, vessel, or other watercraft, or railroad car or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be guilty of burglary in the second degree. Burglary in the second degree shall be punished by imprisonment for not less than two years nor more than fifteen years."

22 D. C. Code 2801 - Grand Larceny

"Whoever shall feloniously take and carry away anything of value of the amount or value of $100 or upward, including things savoring of the realty, shall suffer imprisonment for not less than one nor more than ten years."

22 D. C. Code 2901 - Robbery

"Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years."

STATEMENT OF POINTS

1. The arrest of appellant was an "arrest for investigation" and not one based on probable cause because the arresting officers were using scanty information pertaining to the description of the suspects and the automobile that they were riding in. With respect to Point 1, appellant desires the Court to read the following pages of the reporter's transcript: 4-6, 7-9, 39, 48, 49, 52; Motion to Suppress Evidence 4, 7, 8, 9, 16-18, 41.

2. An automobile, including its trunk, may not be searched without warrant at the time and place its occupants are placed under an illegal arrest. With respect to Point 2, appellant desires the Court to read the following page of the reporter's transcript: Transcript of the Trial 41-43, 58, 59, 63, 64, 99, 163, 166 and 169.

SUMMARY OF ARGUMENT

1. The arrest of appellant was an "arrest for investigation" and not one based on probable cause because the arresting officers were using scanty information pertaining to the description of the suspects and the automobile that they were riding in. Gatlin v. United States, 117 U. S. App. D. C. 123, 326 F. 2d 666 (1963); Bailey (Barry) v. United States, 128 U. S. App. D. C. 254 (1967) (see especially opinion of Leventhal, Circuit Judge).

2. An automobile, including its trunk, may not be searched without warrant at the time and place its occupants are placed under an illegal arrest. Adams v. United States, 336 F. 2d 752 (1964).

ARGUMENT

1. THE ARREST OF APPELLANT WAS AN "ARREST FOR INVESTIGATION" AND NOT AN ARREST BASED ON PROBABLE CAUSE.

To be lawful--and to authorize a search incident thereto--an arrest without a warrant must satisfy the Fourth Amendment's standard of probable cause. Beck v. Ohio, 379 U. S. 89, 91 (1964). This requirement must be met before the search begins, and cannot be satisfied by what the search may uncover. United States v. Di Re, 332 U. S. 581, 595 (1948).

There was no probable cause for Appellant's arrest in the instant case. The only "objective fact" or "reasonably trustworthy information"(Beck v. Ohio, 379 U. S. at 91, 95) known to the police was that Appellant and his companions were three Negro males, (possibly with one person wearing a sailor hat, although this hat was never seen again), riding in a car which, only generally, answered the description of the radio lookout.

The point of arrest in this case, it seems clear, was that instant of time when the unmarked police car blocked the forward progress of the car occupied by the suspects. Bailey v. United States, 128 U. S. App. D. C. 354 (1967) (especially concurring opinion of

Leventhal, Circuit Judge). In order to uphold this arrest on the basis of probable cause at this instant, therefore, the conclusion one must draw is that the arresting officers had a right to stop every car within the confines of the District of Columbia that was blue, bore Virginia tags with at least three numbers being 851 or 852 and was carrying three Negro males. To apply this reasoning would, it seems run afoul of Gatlin v. United States, 117 U. S. App. D. C. 123, 326 F. 2d 666 (1963), which prohibits "arrests for investigation". This line of reasoning seems particularly a propos here where there was some indication that the arresting officers, as well as the Court, were confused whether they had information pertaining to the make of the car before or after the arrest and search of suspects' car. (See colloquy between the Court and counsel, Mot. 7, 8). Also a propos at this point seem the remarks of Judge Leventhal in Bailey v. United States, supra:

> "The court finds probable cause to arrest as of the time the car was stopped. Yet at that time all the police knew was that the car and its occupants were a very rough match to those involved in a robbery nearly four miles away from where the car was first sighted. It was rush hour, with traffic at its heaviest in a poor area of the city, where old cars are relatively numerous. There was nothing suspicious about the way the occupants of the car behaved. I am unwilling to say that any group of three or four Negroes who happened to be riding in an old Chevrolet on that day in a fifty square mile area can without more be searched, booked, and stigmatized by an arrest record regardless of whether they could explain the whole thing away if given an immediate chance. Yet all of these are permissible police actions, if there was probable cause for arrest."

When it is remembered that the arrest in the instant case took place some three hours after the criminal activities and approximately 6.5 miles, ("as the crow files"), from 804 Elder Street, N. W., the argument for sustaining probable cause is further weakened. Thus in Lewis v. United States, 417 F. 2d 755 (1969), a strong point sustaining probable cause was the short period of time from the radio run to the sighting of the suspects, (four to six minutes), and the short distance from the holdup scene, (approximately six blocks).

2. AN AUTOMOBILE MAY NOT BE SEARCHED WITHOUT A WARRANT AT THE TIME AND PLACE ITS OCCUPANTS ARE PLACED UNDER AN ILLEGAL ARREST.

Closely intertwined with the question of probable cause and the validity of the arrest of the appellant is the propriety of the search incident to the arrest. The benchmark case in this area, and the case upon which the trial court relied in denying appellant's motion to suppress is the case of Adams v. United States, 336 F. 2d 752 (1964). As was pointed out by the Court in Bailey v. United States, supra, at 357, however, each case putting the issue of probable cause in issue must be decided on its own fact pattern.

A comparison of the facts in Adams and the instant case show a marked contrast: First, the arrest in Adams was one half hour after the occurence of the crime; in the instant case, the arrest

was at least three hours after the occurrence; Second, the scene of the arrest in Adams was immediately behind the suspected scene of the crime, a looted store; in the instant case, the arrest took place approximately 6.5 miles, ("as the crow flies"), from the scene of the burglary-robbery crime scene; Third, the police officers themselves, in Adams, witnessed the suspicious movements of the suspects they eventually arrested; in the instant case, the arresting officers acted on the strength of a radio run, which gave only a general description of the suspects and the car in which they were riding. Appellant here, as the appellant in Adams alleges that :

> "the search without warrant was illegal since the trunk was locked, the car keys were turned over to the police, and hence there was no danger that, after being arrested, he 'could have used any weapons in the car or could have destroyed any evidence of a crime---.' Preston v. United States, 376 U.S. 364, 368, 84 S. Ct. 881 883, 11 L. Ed. 2d 777 (1964). Thus, there was no emergency justifying a search without a warrant." Adams v. United States, at 752.

Of course, appellant here argues that the search was illegal because of the vast differences in his fact pattern as compared with the Adams fact pattern, outlined above. In this connection, see also United States v. Sconfienza, 309 F. Supp. 322 (1970), where the arrest and subsequent search of the automobile trunk was upheld on appeal, based on personal observations of the arresting officers at the actual scene and occurrence of the crime.

Appellant here submits that his position is closer to the situation in Bowling v. United States, 350 F. 2d 1002 (1965), where a warrantless search was struck down because the arrest of Bowling was an unlawful "arrest for investigation", prohibited by this Court's holding in Gatlin v. United States, Supra.

CONCLUSION

Based on the foregoing, appellant's conviction on all indictment counts should be reversed.

Respectfully submitted,

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